Supreme Court, U.S.
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(2)

No. 90-1273

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

TITAN CAPITAL CORPORATION,
Petitioner,
vs.
KAY HOLLINGER, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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March 27, 1991

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QUESTION PRESENTED:

In an action by customers against a broker-dealer, do the control person provisions of the 1933 Securities Act (§15) and the 1934 Securities Exchange Act (§20(a)) preclude recovery by plaintiff customers on a theory of *respondeat superior*?

LIST OF PARTIES

PETITIONER:

Titan Capital Corporation

RESPONDENTS:

Kay Hollinger, an individual.

Judy D'Arcy, individually and as next friend of Tracey and Jody D'Arcy.

K-Judy, Ltd., a Washington corporation. K-Judy, Ltd. has no parent, subsidiaries, or affiliates.

Edward Nissen, an individual.

Richard Llewellyn Jones, an individual.

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I. REASONS FOR DENYING THE WRIT

A. SUMMARY

There is less in this than meets the eye.

--Attributed to Tallulah Bankhead.

There are at least three reasons why this case is not worthy of *certiorari*. First, **all** of the circuits which have addressed the issue of *respondeat superior* in securities fraud cases against broker-dealers have allowed the cause of action, including the Third, Fourth and Sixth Circuits. Second, this Court **refused** *certiorari* on this same issue quite a few times. Third, the Ninth Circuit's ruling, like those of the other circuits, correctly decided the case. Congress specifically made the control person liability statutes cumulative of, and in addition to, existing remedies at law and equity. *Respondeat superior* was a well established and frequently used liability theory prior to Congress' adoption of the '33 Securities Act and '34 Exchange Act.

B. THE CIRCUITS DO NOT CONFLICT

Despite Titan's fervent attempts to find a conflict in the circuits as a basis for *certiorari*, the circuits are not in conflict, but in harmony. The Ninth Circuit's decision below conforms to the rulings of the other circuits by allowing customer plaintiffs common law secondary liability causes of action against defendant broker-dealers for the fraud of the broker-dealer's agents, employees, and servants. Titan alleges a conflict between the Third, Fourth and Sixth Circuits and the others, including the

First, Second, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh.[1] In fact, the Third, Fourth and Sixth Circuits **agree** with the other circuits that *respondeat superior* is an available cause of action in customers' suits against broker-dealers.

1. The Third Circuit Recognizes *Respondeat Superior*

The Third Circuit recognizes common law secondary liability causes of action in suits by customers against broker-dealers. In *Rochez Brothers, Inc. v. Rhoades*, 527 F.2d 880 (3rd Cir. 1975), the Third Circuit rejected such causes of action in other than broker-dealer situations, but said it would allow such actions by customers against broker-dealers:

> We are not faced with the type of relationship that prevails in the broker-dealer cases where a stringent duty to supervise employees does not exist. This duty is imposed to protect the investing public and make brokers aware of the special responsibility they owe to their customers. We can find no reason to impose this same duty in a situation like the one presently before us where the parties were dealing for themselves and for their own accounts.

Id. at 886 (footnote omitted). In two later cases, the Third Circuit elaborated on this exception, and expressly allowed common law secondary liability claims.

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1 Petition, pp. 7-11.

In a decision in which this Court refused to grant *certiorari*,[2] the Third Circuit said:

> We conclude that the rule announced in *Rochez II* [527 F.2d 880, prohibiting the use of *respondeat superior* in Rule 10b-5 actions] is and should be viable, that *Rochez II* envisioned exceptions to that rule and this record supports the district court's determination that Coopers & Lybrand is liable for the wrongful acts of Higgins under the previous exception set forth therein.

Sharp v. Coopers & Lybrand, 649 F.2d 175, 181 (3rd Cir. 1981), *cert. denied* 455 U.S. 938 (1982). Note that to the extent *Rochez* limited the application of the exception to broker-dealers, *Sharp* expanded the exception to include other professionals involved in the offering process, such as accountants.

In 1985, the Third Circuit overturned a jury verdict and directed entry of judgment against a law firm based on its secondary liability for the acts of one its partners in preparation of offering memoranda: "We conclude that PWC&M was vicariously liable for the acts of its shareholder/employee and 'de facto partner' Wasserstrom in negligently preparing offering materials during the scope of his employment with the firm . . . ." *Eisenberg v. Gelrod, Fox and Co.*, 766 F.2d 770, 784 (3rd Cir. 1985). Like the other circuits, the Third Circuit

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[2] As noted below at pp. 5-6, this Court has frequently denied *certiorari* on this issue. For the text of the question presented in *Sharp*'s petition, see appendix at p. 2a.

allows causes of action based on the secondary liability of employers and principals in the context of broker-dealers, accountants, and lawyers.

2. The Fourth Circuit Recognizes *Respondeat Superior*

The Fourth Circuit also recognizes common law secondary liability in the broker-dealer context. "Finally, Merrill Lynch's liability for churning would not depend solely on its lack of effective supervision, *but would also arise from familiar principles of an employer's secondary liability.*" *Carras v. Burns*, 516 F.2d 251, 259 (4th Cir. 1975) (emphasis added), citing *Johns Hopkins University v. Hutton*, 422 F.2d 1124, 1130 (4th Cir. 1970).

Titan argues that there is an intramural conflict within the Fourth Circuit, that *Carras* conflicts with *Carpenter v. Harris, Upham & Co.*, 594 F.2d 388 (4th Cir. 1979). No such conflict exists; *Carpenter* does not address or discuss secondary or secondary common law theories of liability. *Carpenter* discusses only statutory control person liability.

Even if an intra-circuit conflict existed, the United States Supreme Court is not the appropriate forum for its resolution. The appropriate forum would be an *en banc* hearing in the Fourth Circuit.[3] "Since there was a conflict between our panel decisions in *Farish* and *Bly* on the privity issue, we granted rehearing *en banc* in both cases and consolidated them for this appeal." *Farish v. Courion*

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[3] The *en banc* hearing below came about because of just such an intra-circuit conflict. Prior circuit decisions conflicted regarding scienter and plaintiffs' burden of proof in control person cases. *See* Petition, Appendix pp. 14a-15a, 26a-27a.

Industries, Inc., 754 F.2d 1111, 1114 (4th Cir. 1985). *See also* Fed. R. App. P. 35 ("Such hearing or rehearing [en banc] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions . . . .").

3. The Sixth Circuit Recognizes *Respondeat Superior*

The Sixth Circuit also recognizes common law theories of secondary liability in the broker-dealer setting. In *Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976), the Court said, "The Securities Acts were not intended to preempt the operation of the doctrine of *respondeat superior* in a case involving unlawful activities of a brokerage firm's employees. * * * [T]raditional agency principles may be applied." *Id.* at 695 (emphasis added).[4]

C. THIS COURT DENIED CERTIORARI FIVE TIMES BEFORE

This Court has been asked to grant petitions for *certiorari* on this same issue five times, and each time the Court denied the petition. *Marbury Management, Inc. v. Kohn*, 629 F.2d 705 (2nd Cir.), *cert. denied sub nom Wood Walker & Co. v. Marbury Management, Inc.*, 449 U.S. 1011

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[4] This case and *Holloway* only involve customer suits against broker-dealers. In cases not involving broker-dealers, the Sixth Circuit rejected common law secondary liability in securities cases. *SEC v. Coffey*, 493 F.2d 1304, 1316 (6th Cir. 1974); *SEC v. Washington Cty. Utility Dist.*, 676 F.2d 218, 224 n. 11, 337 (6th Cir. 1982)

(1980)[5]; *Henricksen v. Henricksen*, 640 F.2d 880 (7th Cir.), *cert. denied sub nom Smith Barney, Harris, Upham & Co. v. Henricksen*, 454 U.S. 1097 (1981)[6]; *Sharp v. Coopers & Lybrand*, 649 F.2d 175 (3rd Cir. 1981), *cert. denied* 455 U.S. 938 (1982)[7]; *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2nd Cir.), *cert. denied sub nom Louis Sternbach & Co. v. Sirota*, 459 U.S. 908 (1982);[8] *In Re Atlantic Financial Management, Inc.*, 784 F.2d 29 (1st Cir.), *cert. denied sub nom AZL Resources, Inc. v. Margaret Hall Foundation, Inc.*, 481 U.S. 1072 (1986).[9] In each of these cases, one or more of the questions presented in the petition for *certiorari* explicitly raised the issue for which Petitioner Titan seeks *certiorari*. The texts of the relevant questions presented in these petitions for *certiorari* are reproduced in the Appendix to this brief.

Ironically, all of those cases sought *certiorari* at a time when there was a clear conflict in the circuits: the Ninth Circuit still rejected *respondeat superior*, and the others (*e.g.*, the First, Second, *et al.*) allowed it. Despite the conflict then, the Court repeatedly refused to grant *certiorari*. The Court should not grant *certiorari* now, when there is no longer a conflict in the circuits.

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5 For text of the question presented in the petition for *certiorari* in *Marbury Management*, see Appendix, p. 1a.

6 For text of the questions presented in the petition for *certiorari* in *Henricksen*, see Appendix, p. 1a.

7 For text of the question presented in the petition for *certiorari* in *Sharp*, see Appendix, p. 2a.

8 For text of the question presented in the petition for *certiorari* in *Sirota*, see Appendix, p. 3a.

9 For text of the question presented in the petition for *certiorari* in *Atlantic Financial*, see Appendix, p. 3a.

D. The Case Was Correctly Decided

The Ninth Circuit's decision was correct. Both the '34 Act and the '33 Act control person sections explicitly state Congress' intent that those sections be cumulative of, and in addition to, all existing remedies at law and equity.[10]

The doctrine of *respondeat superior* was well established prior to adoption of the '33 and '34 Acts. This Court said in 1852 that *respondeat superior* is "universally applied" when the wrongful act is done in the course and scope of employment. *Philadelphia & Reading Ry. Co. v. Derby*, 55 U.S. 468, 484 (1852). Lower federal courts frequently applied the doctrine prior to 1933. *Helms v. Northern Pac. Ry. Co.*, 120 F. 389, 392, 395-96 (10th Cir. 1903); *Western Union Telegraph v. Catlett*, 177 F. 71 (4th Cir. 1910); *Whitted v. Southwestern Telephone and Telegraph Co.*, 231 F. 926, 927 (8th Cir. 1916); *Delaware, L. & W. Ry. Co. v. Pitlinger*, 293 F 853, 855-56 (3rd Cir. 1923).

This Court recognized the application of *respondeat superior* in the context of the anti-trust laws. The American Society of Mechanical Engineers was held liable for the anti-trust violations of one of its committees. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

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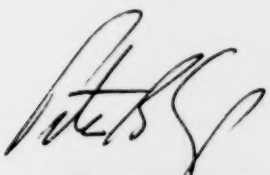
10 "The rights and remedies provided by this title shall be *in addition to* any and all other rights and remedies that may exist at law or in equity." '33 Securities Act, §16 (emphasis added), 15 U.S.C. §77p. "The rights and remedies provided by this title shall be *in addition to* any and all other rights and remedies that may exist at law or in equity . . . . " '34 Exchange Act, §28(a) (emphasis added), 15 U.S.C. §78bb(a).

II. CONCLUSION

There is no conflict in the circuits. The circuits agree that *respondeat superior* liability is not excluded by §15 of the 1933 Securities Act or by §20(a) of the 1934 Securities Exchange Act. This Court denied petitions for writs of *certiorari* five times when a conflict existed between the Ninth Circuit and the other circuits. There is far less reason to grant *certiorari* now than there was when it was denied five times. The circuits correctly decided that neither §15 nor §20(a) supplant or exclude common law liability. Sections 16 of the 1933 Securities Act and 28 of the 1934 Securities Exchange Act clearly state that the control person remedies are cumulative of, and in addition to, existing common law remedies.

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully Submitted this the 27th day of March, 1991.



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Questions Presented In Previous Certiorari Denials

Marbury Management v. Kohn, 629 F.2d 705 (2nd Cir.), *cert. denied sub nom Wood Walker & Co. v. Marbury Management, Inc.*, 449 U.S. 1011 (1980).

> *Question Presented:* (1) Is the common law concept of *respondeat superior* read into the Securities Act of 1934 and specifically into §10(b), 15 U.S.C. §78j(b)) to hold an employer absolutely liable without *scienter* for the acts of its employees?
>
> Docket No. 80-342, filed Sept. 2, 1980, quoted in 49 U.S.L.W. 3316 (Oct. 28, 1980).

Henricksen v. Henricksen, 640 F.2d 880 (7th Cir.), *cert. denied sub nom Smith Barney, Harris, Upham & Co. v. Henricksen*, 454 U.S. 1097 (1981).

> *Questions Presented:*
>
> (1) Under the Securities Exchange Act of 1934, may absolute liability be imposed on a "controlling person" for losses resulting from violations of the Act by a controlled person, abrogating the "good faith" defense of §20(a) of the Act by applying common law doctrine of *respondeat superior*?
>
> (2) Does the "scienter" requirement of *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 44 U.S.L.W. 4451 (1976), permit imposition of secondary liability on

QUESTIONS PRESENTED IN PREVIOUS CERTIORARI DENIALS

a controlling person, under §20(a), without regard to fault?

(3) Does the "scienter" requirement of *Ernst & Ernst v. Hochfelder* permit imposition of secondary liability on a controlling person, under §20(a) of the Act, where that person did not act recklessly or with intent to deceive, manipulate, or defraud?

Docket no. 80-2211, quoted in 50 U.S.L.W. 3062 (Aug. 18, 1981).

Sharp v. Coopers & Lybrand, 649 F.2d 175 (3rd Cir. 1981), *cert. denied* 455 U.S. 938 (1982).

Question Presented: (1) Does the Securities Exchange Act of 1934 impose liability under the common law doctrine of *respondeat superior* when a jury has found that no partner in defendant accounting firm acted recklessly or with intent to defraud and that it was not foreseeable to defendant that plaintiffs would suffer any injury from defendant's allegedly misleading tax opinion letter?

Docket No. 81-433, quoted in 50 U.S.L.W. 3329 (Oct. 27, 1981).

Questions Presented In Previous Certiorari Denials

Sirota v. Solitron Devices, Inc., 673 F.2d 566 (2nd Cir.), *cert. denied sub nom Louis Sternbach & Co. v. Sirota*, 459 U.S. 908 (1982).

> *Question Presented:* (1) Whether the common law doctrine of *respondeat superior* is an implied remedy available in private causes of action commenced under Section 10(b) of the Securities Exchange Act of 1934?
>
> Docket no. 82-236, quoted in 55 U.S.L.W. 3269 (October 5, 1982).

In Re Atlantic Financial Management, Inc., 784 F.2d 29 (1st Cir.), *cert. denied sub nom AZL Resources, Inc. v. Margaret Hall Foundation, Inc.*, 481 U.S. 1072 (1986).

> *Question Presented:* Does Section 20 (a) of the Securities Exchange Act of 1934 determine the vicarious liability of a corporation for the alleged securities fraud of its chairman committed with apparent authority only and solely for his own person gain, thereby making applicable to the corporation the defense of its good faith and its not having directly or indirectly induced the acts complained of, or do common law principles of vicarious and strict liability determine the liability of a corporation under such circumstances?
>
> Docket no. 85-1877.

Securities Act of 1933

Section 16 (15 U.S.C. §77p)

The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.